



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

FILE: LIN 01 067 52886

OFFICE: NEBRASKA SERVICE CENTER

DATE: JAN 14 2003

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 USC 110(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the nonimmigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The director's decision shall be withdrawn and the case remanded for entry of a new decision.

The petitioner is an Illinois nursing home with 42 employees and a gross annual income of \$960,000. It seeks to employ the beneficiary as its Dietary Supervisor for a period of three years.

The director denied the petition because he found that the petitioner had failed to demonstrate that the beneficiary is qualified to work in a specialty occupation. On appeal, the petitioner submitted a brief.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b), provides in part for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical knowledge application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

8 C.F.R. 214.2(h)(4)(ii) further defines the term "specialty occupation" as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

In the initial petition, the petitioner listed the duties of the position as selecting items to be included in the menu, ordering supplies, receiving deliveries, training kitchen staff to prepare food according to company policy, and maintaining records pertinent to kitchen costs.

With the petition, the petitioner submitted what purports to be a non-certified copy of the beneficiary's transcript from Philippine Union College in Manila showing that the beneficiary graduated with a bachelor of science in nutrition and dietetics. The petitioner also submitted a letter from an educational evaluation service stating that the petitioner's degree is equivalent to a bachelor's degree in nutrition and dietetics from an accredited United States institution.

The director requested the petitioner to submit additional evidence pertinent to the proffered position. Specifically, the director requested evidence that the beneficiary holds the license necessary to work as a dietary supervisor in Illinois or, in the alternative, evidence that the state of Illinois requires no such license to hold that position.

In response, counsel for the petitioner submitted a letter in which he noted that the proffered position would be supervised by a dietitian. In support of the proposition that the proffered position does not require state licensure or certification, counsel submitted a printout of an exchange of E-mail between himself and an official of the Commission on Dietetic Registration.

Counsel further cited the U.S. Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) for the proposition that dietitians and nutritionists must have at least a bachelor's degree in dietetics, foods and nutrition, food service management, or a related area.

Counsel stated, however, that a Dietary Supervisor is not necessarily a licensed dietitian and does not necessarily require a state license. In support of that proposition, counsel submitted a two page print-out of content from the website of the Florida Health Care Administration (FHCA) and a page of content from West Publishing's ImmForms Plus Law Desk CD Rom research library. The print-out from the FHCA states that a Dietary Supervisor is not necessarily a licensed dietitian. The print-out from the ImmForms states that a Dietary Manager may be required to have a competency certificate.

The director denied the petition finding that, state licensure is required in order to carry out the duties of the proffered position at a professional level, and that the petitioner had not established that the beneficiary has the requisite state license.

On appeal, counsel asserted that the evidence demonstrates that the applicant has all of the necessary qualifications for the proffered position. Counsel reiterated the evidence in support of the contention that the proffered position does not require state licensure.

Pursuant to 8 C.F.R. 214.2(h) (4) (iii) (A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. 214.2(h) (4) (iii) (C) states that:

To qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education; specialized training; and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record contains insufficient evidence to support the director's finding that the proffered position requires state licensure. Although a majority of states require licensure of dietitians, the petitioner stated that the position need not be filled by a

licensed dietitian, and the director did not explicitly find that the proffered position is a dietitian position. The print-out from ImmForms states that a competency certificate may be required of a Dietary Manager, but that is insufficient to show that such a certificate is required of the proffered position. Absent additional evidence, to deny this petition because the beneficiary does not have such a state license was in error.

However, the petition may not now be approved as the record is presently constituted. The director has not determined whether the proffered position is a specialty occupation. Although the petitioner appears to have demonstrated that a dietitian position is a specialty occupation, the petitioner also stated that the proffered position need not be filled by a licensed dietitian. Furthermore, the director did not explicitly find that the proffered position is a dietitian position. If the evidence is found to establish that the proffered position is, in fact, a dietitian position, then the finding that it requires state licensure might be appropriately reinstated. If the proffered position is not a dietitian position, then whether it is a specialty occupation has never been addressed, and must be determined. Accordingly, the petition is remanded back to the director to determine whether the proffered position is a specialty occupation.

The director may request any evidence he deems necessary in order to assist him in determining these issues. As always, the burden of proof remains upon the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The director's decision is withdrawn. The case is remanded for entry of a new decision, which, if adverse to the petitioner, is to be certified to the Associate Commissioner for review.